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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

SAN VICENTE MEDICAL PARTNERS, LTD.,
Petitioner,

vs.

ASHLEY S. ORR, Receiver of American Principals Corporation, a California corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When a federal district court has no pendent-party jurisdiction to join petitioner as a party in an action brought by the Securities and Exchange Commission against petitioner's general partner, does the district court exceed its jurisdiction by including petitioner's property within an equity receivership established by the court?

2. Assuming *arguendo* the district court's jurisdiction to include in its receivership the property of a nonparty, did the district court violate petitioner's right to due process by including its property in the receivership and accruing administrative charges without fair notice?

3. Assuming *arguendo* that petitioner's property was lawfully included in the district court's receivership, what standards should apply in computing compensation for an equity receivership as a superceded custodian under Section 503(b)(3)(E) of the Bankruptcy Code?

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No.

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OCTOBER TERM, 1991

IN RE: SAN VICENTE MEDICAL PARTNERS, LTD.,
Debtor.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
vs.
AMERICAN PRINCIPALS HOLDINGS, INC.,
Defendant.

SAN VICENTE MEDICAL PARTNERS, LTD.,
Debtor-in-Possession,
Petitioner,
vs.
ASHLEY S. ORR, Receiver of American Principals Corporation,
a California corporation,
Receiver-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner San Vicente Medical Partners, Ltd., debtor-in-possession and cross-claimant in the district court and appellant in the Court of Appeals, respectfully prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the

Ninth Circuit filed May 4, 1992, in Case No. 90-55834 of that Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is officially reported at ____ F.2d ____, and appears in the appendix at pp. a1 – a15. The findings of fact and conclusions of law of the U.S. District Court for the Southern District of California are not officially reported and appear in the appendix at pp. a16 – a33. The order re creditor claim of Ashley S. Orr and counterclaim filed in the district court is not officially reported and appears in the appendix at pp. a34 – a35.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1992. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution, Section 27 of the Securities Exchange Act of 1934, 15 U.S.C § 78aa, and Section 503(b)(3)(E) of the Bankruptcy Code, 11 U.S.C. § 503(b)(3)(E), are set forth in the appendix at pp. a36 – a37.

STATEMENT OF THE CASE

Petitioner San Vicente Medical Partners, Ltd. ("SVMP"), is a California limited partnership formed in 1981. The original general partner of SVMP was American Principals Corporation ("APC"). APC was a corporate subsidiary of American Principals Holdings, Inc. ("APHI"), a syndicator of investment interests in limited partnerships. SVMP was formed to purchase and develop a parcel of real estate as an eleven-story office building for physicians in Los Angeles. APC sold 90 units of interest in SVMP to limited partners for $150,000.00 per unit in cash and notes. The funds invested in SVMP by its limited partners were

used, together with funds from a construction loan, to pay a contractor to construct the office building.

In 1984, after SVMP had entered into a construction contract and the building was almost half completed, the Securities and Exchange Commission ("SEC") filed an action in the U.S. District Court for the Southern District of California charging APHI and its subsidiaries with violations of the federal securities laws. Upon commencement of its action, the SEC filed an application with the district court requesting appointment of a receiver to take custody of APHI and certain of its subsidiaries, including APC. On June 15, 1984, the district court, acting *sua sponte* without nomination by the SEC, selected and appointed as temporary receiver Ashley S. Orr. As of the date of his appointment, Orr had been retired from law practice for seven years and had no prior experience as a receiver, or as counsel for a receiver, or with securities litigation. On the same date, June 15, the district court issued a temporary restraining order and an order to show cause why a permanent receiver should not be appointed for APHI and certain of its subsidiaries. On June 26, 1984, the district court filed an Order Appointing Permanent Receiver naming Orr as permanent receiver ("Receiver") —

> "for all funds, assets, choses in action and other *property belonging to, or in the possession or control of, defendant [APHI] and its subsidiaries*, excepting Private Ledger Financial Services, Inc. ("Private Ledger"), and [ordered] that such permanent receiver:
>
> 1. Be immediately authorized, empowered, and directed to collect and take custody, control, possession and charge of *all funds, assets, premises (owned, leased, occupied or otherwise controlled), choses in action and other property of defendant APHI and its subsidiaries* excepting Private Ledger . . ." (Emphasis added.)

From time to time during the next several months, limited partners of SVMP received general correspondence from the Receiver giving assurances that the affairs of APHI would be placed in order, and that a report concerning the misconduct by APC in relation to SVMP would be forthcoming. No such report

was furnished by the Receiver, but the Receiver's counsel served on the limited partners of SVMP a notice dated April 25, 1985, of a hearing to be held May 20, 1985, in the district court on the Receiver's Proposed Plan Of Substantive Consolidation.

By promptly obtaining counsel, certain limited partners of SVMP obtained a copy of the voluminous report and proposal filed by the Receiver in the district court. The Receiver essentially proposed that every separate limited partnership doing business with APHI be consolidated into a single entity so that all assets of every limited partnership and APHI could be commingled by the Receiver. Certain limited partners of SVMP filed timely opposition to the Receiver's proposal of substantive consolidation on grounds, in part, that SVMP was not a party in the action and the district court had no jurisdiction to order that its property be taken and shared with other entities. The opposition further noted that the district court's Order Appointing Permanent Receiver did not expressly include in the receivership any limited partnership, any limited partner, or the property of any limited partnership.

At the hearing held May 24, 1985, the district court denied the Receiver's proposal of substantive consolidation on grounds that the limited partnerships, including SVMP, were not named parties in the action, and the court had no authority to order the consolidation. On June 12, 1985, the district court issued a written order (never served on SVMP) denying the Receiver's Proposal of Consolidation, and stating the court had jurisdiction over property of the limited partnerships "for estate administrative purposes."

On the same date the Receiver was appointed, the district court had issued an order staying all proceedings against APHI and its subsidiaries except through the district court. Therefore, the limited partners of SVMP sought and obtained an order filed June 14, 1985, removing the Receiver and APC as general partner of SVMP, substituting a newly designated general partner of SVMP, and ordering the Receiver to turn over to counsel for the new general partner without offset any assets of SVMP held by the Receiver. At the same hearing in the district court, the Receiver requested award of a fee for having "administered" the

property of SVMP for a period of almost one year, but the district court denied the award "without prejudice."

When the Receiver was appointed, the bank accounts and real estate owned by SVMP stood in the name of SVMP. While APC was general partner of SVMP, the checks written to pay SVMP expenses from SVMP bank accounts were signed by APC as SVMP's general partner. During the time the Receiver had control of APC and APC remained the general partner of SVMP, the Receiver gained check-writing authority over $541,000.00 in cash already in SVMP bank accounts. The Receiver collected an additional $863,000.00 of funds due SVMP during that time, comprised primarily of note payments to SVMP by limited partners. By the time APC was removed as general partner of SVMP, the Receiver had spent all of this money, and turned over to the new general partner of SVMP only about $16,000.00 in undeposited checks from limited partners as note payments.

When APC was removed as general partner, the contractor had completed construction of the shell of the office buiding, which had an appraised value between $18,000,000.00 and $20,000,000.00, but was subject to a lien for the construction loan of $20,575,000.00 plus accruing interest. Moreover, creditors ultimately filed claims of $7,300,000.00 against SVMP. The Receiver, serving as co-special master in a related securities class action against APHI, reported to the district court in that case in June, 1985, that SVMP had no value. The "no value" valuation was accepted by the district court in the related action. Considering creditor claims, SVMP's liabilities actually exceeded assets by more than $7,000,000.00. Offsetting this somewhat was SVMP's claim of $6,300,000.00 against APHI for various misappropriations of funds and other wrongdoing. In summary, before APC was removed as SVMP's general partner, APC and the Receiver had expended more than $32,000,000.00 ($20,575,000.00 in loan funds plus about $10,700,000.00 invested by SVMP's limited partners) and, with those funds, had developed real estate worth no more than $20,000,000.00 and still owed claims exceeding $7,000,000.00.

SVMP filed a petition in the U.S. Bankruptcy Court for relief under Chapter 11 of the Bankruptcy Code on February 14, 1986.

The Receiver filed a secured creditor claim for "services rendered" dated December 8, 1986, for $425,878.00. On June 24, 1987, SVMP filed an adversary action in its bankruptcy proceeding objecting to the Receiver's claim and asserting a counterclaim for $167,387.00, plus additional amounts according to proof. The parties stipulated to remove the adversary proceeding to the district court for trial, which was held June 26, 1989. Evidence at the trial showed that any expense incurred by the Receiver which could be identified with SVMP had been paid directly with funds from SVMP accounts. The claim filed by the Receiver against SVMP consisted of "unallocated administrative expenses" which could not be identified with SVMP. The so-called unallocated expenses of the receivership had been paid from the assets of APHI. However, in order to replenish the assets of APHI, and thus the receivership, the Receiver designed a formula allocating all receivership expenses among the limited partnerships and APHI. In simple terms, the Receiver's formula allocated the expenses in proportion to a gross asset value assigned to each entity. By the Receiver's formula, a very low asset value was assigned to APHI and its subsidiaries, resulting in APHI's "allocated share" of receivership expenses being only $27,540.00. By comparison, the Receiver valued SVMP's gross assets at $20,575,000.00 (giving no regard to the corresponding liabilities far in excess of that amount), which gave rise to the Receiver's claim at trial of $425,878.00. The total cost of the APHI receivership prior to the time APC was removed as SVMP's general partner was $1,571,612.00. These costs had been paid from the assets of APHI, since the records showed that the Receiver had collected $1,546,641.00 in cash payments due APHI and its subsidiaries during that first year, including the sale of APHI's Private Ledger subsidiary for $750,000.00.

The Receiver's timesheet showed a total of 49.75 hours worked on all SVMP matters during the year, including only 22 hours devoted to non-litigation matters. The Receiver testified he spent twice the amount of time recorded on his timesheets on SVMP matters. The district court found that the Receiver utilized services of other personnel for SVMP business, but the evidence proved that all such personnel were paid directly from funds of SVMP. Only the hours worked by the Receiver were not paid

directly by SVMP. The Receiver was paid $75.00 per hour for his time by the receivership. The district court accepted the Receiver's testimony that he worked twice as many hours as he recorded on his timesheet. The district court awarded the Receiver the entire claim of $425,878.00. No more than about 100 hours of work by the Receiver gave rise to the award against SVMP of $425,878.00, equivalent to a rate of $4,258.00 per hour, or a multiplier of 114 times the actual rate of $75.00 per hour. The district court stated that the amount awarded would not go to the Receiver personally to compensate for his efforts on behalf of SVMP, but would be "used to meet the past and continuing obligations of the Receiver in his administration of the overall Estate." *Infra*, pp. A-21 *et seq.* However, rather than basing the award against SVMP on an allocated share of receivership expenses, the district court fashioned the award as fees for services as a custodian payable under the Bankruptcy Code and determinable in the same manner as professional fees. The district court ruled that the standard for compensating custodians is payment at the normal rate charged in the community for equivalent services, and then found and concluded that the "administrative fee" requested by the Receiver was "reasonable in light of the amount at stake, the risk involved, and the efforts expended. . . ."

The Court of Appeals addressed SVMP's contention that the district court lacked authority to include SVMP's property in the receivership by acknowledging that the argument "is not without merit" and that "the issue raises serious questions concerning the limits of the court's power." *Infra*, p. a8. Nevertheless, the Court of Appeals then applied the "minimum-contacts" analysis of *International Shoe* as the basis for concluding that the district court's exercise of jurisdiction over the property of SVMP satisfied the requirements of due process. The Court of Appeals then proceeded to rule that, since the district court had included SVMP's property in the receivership, the Receiver could properly recover "unallocated receivership expenses" from SVMP because the receivership had benefited SVMP. The Court of Appeals viewed the district court's award as "for unallocated receivership expenses and accounting expenses" and as a "pro-rata share of [the receiver's] total expenses," but also as based on the "time and effort" expended by the Receiver on behalf SVMP. *Infra*,

p. a14. The Court of Appeals approved the consideration of factors applicable in professional fee determinations, and affirmed the award of $425,878.00 as supported by the factual findings and reasonable.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT QUESTION WHETHER FEDERAL COURTS HAVE JURISDICTION TO EXPAND THE SCOPE OF AN EQUITY RECEIVERSHIP BY INCLUDING PROPERTY OF NONPARTIES IN THE RECEIVERSHIP ESTATE.

SVMP was not a party in the federal court action filed by the SEC against APHI and its subsidiaries. Under this Court's decision in *Finley v. United States*, ____ U.S. ____, 109 S.Ct. 2003, 2007 (1989), SVMP could not have been made a party in the SEC action because no grounds existed for a federal cause of action against SVMP. Accordingly, even if the Receiver had served summons and complaint against SVMP or its limited partners seeking to subject SVMP's property to the control of the Receiver, such a complaint would have been subject to dismissal for lack of federal jurisdiction over the subject matter, since pendent-party jurisdiction after *Finley* "is no longer a viable concept." *Staffer v. Bouchard Transportation Co.*, 878 F.2d 638, 643 n. 5 (2nd Cir. 1989); *Sarmiento v. Texas Board of Veterinary Medical Examiners*, 939 F.2d 1242, 1246-48 (5th Cir. 1991).[1]

The absence of jurisdiction in the district court to adjudicate SVMP's rights and interests is not cured by simply according due process in the exercise of jurisdiction. Unlike the state courts of general jurisdiction involved in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945) and *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569 (1977), the federal courts "are

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[1]Congress has recently authorized "supplemental jurisdiction" over claims that form part of the same case or controversy and involve joining additional parties, but only in actions commenced after December 1, 1990. 28 U.S.C. § 1367, 104 Stat. 5113.

courts of limited jurisdiction marked out by Congress." *Finley v. U.S., supra*, ____ U.S. ____, 109 S.Ct. at 2007. Unless given statutory jurisdiction by Congress, a federal court cannot act at all, and only when such statutory jurisdiction exists may the federal court proceed in a manner consistent with due process.

Neither the district court nor its Receiver ever attempted to join SVMP as a pendent party in the SEC action against APHI. Rather, the district court and its Receiver acted against SVMP much more aggressively in a display of raw judicial power. Without fair notice to SVMP or its limited partners, the district court subjected SVMP's property to the discretion and control of the court's Receiver after a summary hearing in which SVMP was unrepresented. No adverse party under any federal jurisdictional statute could have accomplished such a usurpation of SVMP's rights. Indeed, the Order Appointing Permanent Receiver which the district court later interpreted as providing the Receiver powers over SVMP's property does not identify SVMP, or any limited partnership, or refer to the property of any limited partnership. Neither the Order Appointing Permanent Receiver nor the court's subsequent "interpretation" was even served on SVMP or its limited partners.[2]

Thus, this petition presents not merely a request to determine whether a particular federal statute has authorized pendent party jurisdiction. This Court's attention is needed to define clearly the jurisdictional limits on federal courts in their use of equity receivership powers against nonparties, particularly as such powers are exercised recurrently in securities fraud cases.

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[2]The Court of Appeals states that the Receiver mailed a copy of an Order To Show Cause Why A Permanent Receiver Should Not Be Appointed to all the limited partners of SVMP on June 20, 1984, but that assertion had not been made previously. The Receiver did not provide evidence at the hearing to that effect, the district court did not make that finding, and the Receiver's brief did not so argue on appeal. Counsel for SVMP have no copy of such an Order, and the alleged date of mailing to limited partners across the country preceded appointment of the Receiver by only six (6) days.

The securities laws grant jurisdiction over the SEC's action against APHI, and from that jurisdiction flows the district court's equity power to impose a receivership upon APHI and its corporate subsidiaries due to their violations of the securities laws. The property of APHI was identifiable and separable from the properties of all other parties. SVMP's money was in its own bank accounts and title to its real property was in SVMP's own name. The shepherding of APHI's assets to prevent further wrongdoing, and to respond for previous wrongful acts of APHI, would have been a reasonably manageable receivership. Instead, the district court (acting retrospectively in June, 1985, through an order never served on SVMP) cast its net much more broadly to ensnare the properties of 82 separate, innocent nonparties so as to subject those nonparties to the summary administrative control of the district court and its Receiver. By its sweeping, retroactive interpretation of its own summary order, the district court took charge of both a substantial business enterprise (APHI) and all the properties of nonparties which had contractual relations with the defalcating enterprise. Under the district court's *imprimatur*, the Receiver engaged in extensive business activities, including the liquidation of a major subsidiary (Private Ledger), and expended more than $1,500,000.00 in liquid assets of APHI plus additional millions of dollars belonging to the independent nonparties within only the first twelve months of the receivership.

No statute authorizes any party to join SVMP as a party in the action before the district court. In that statutory context, one must ask by what authority may the district court itself force SVMP into the court's forum by seizing property so that SVMP must follow to protect its interests? Certainly no Act of Congress has been cited as affording such authority to federal courts.[3] If the minimum-contacts analysis of *International Shoe* were the pertinent standard for exercise of such power as the Court of Appeals holds, then the district courts would hold the power to bring

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[3]Section 27 of the Securities Exchange Act of 1934 grants "jurisdiction of violations" of the Act and of suits brought "to enforce any liability or duty" created by the Act, but contains no express authority to join victims of such violations as parties. The same is true of §§ 20 and 22 of the Securities Act of 1933, 15 U.S.C. §§ 77t, 77v, 48 Stat. 86.

nonparties before them without Congressional authorization. That conclusion is squarely at odds with this Court's prior decisions. *See, e.g., Finley v. U.S., supra,* ____ U.S. at ____, 109 S.Ct. at 2006 ["two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it.* . . . To the extent that such action is not taken, the power lies dormant." (Emphasis in original.)]

Resolution of this jurisdictional issue has profound consequences for the sound administration of the federal judicial system. A judicially imposed equity receivership is acknowledged to be a "harsh and drastic remedy" which "may be imposed only when no less stringent means is available for protecting the rights of parties." *See,* Farrand, "Ancillary Remedies in SEC Civil Enforcement Suits," 89 *Harv. L. Rev.* 1779, 1790, 1805 (1976); Roberts, "The Extent of Federal Judicial Power: Receivership of South Boston High School," 12 *New Eng. L. Rev.*, 55, 70-71 (1976) ["receivership should not be utilized if any less drastic, appropriate remedy is available"]. This "harsh and drastic remedy" against *parties* becomes truly Draconian when the receivership is imposed on the property of *nonparties.* The existing law of this Court contains no clear statement of the jurisdictional limits applicable to the district courts in this volatile context. The Court should not leave unattended this potential for judicial power running amok over the rights of citizens.

In *SEC v. American Board of Trade, Inc.*, 830 F.2d-431, 436-38 (2nd Cir. 1987), the Second Circuit expressed its strong concern for the improper use of receiverships as a substitute for bankruptcy. The Second Circuit instructed the SEC to bring its views to the attention of any district court *before* the court embarks on a liquidation through an equity receivership created under the jurisdiction of an action for securities fraud. The Second Circuit required advance notice to the district court because ordinarily a court of appeals will not have the opportunity to review a receivership proceeding until the receivership is far advanced, thus illustrating that supervision of receiverships by the courts of appeals presents intractable problems in judicial administration. Undoubtedly, the Second Circuit would find even greater cause

for concern in the receivership activities approved by the Ninth Circuit in this case, because *American Board of Trade* involved only the assets of the defalcating *parties* to the securities fraud. Here, the Receiver has engaged in liquidation and other business operations of parties and nonparties as well, including SVMP.

By granting review of this petition, the Court will have the opportunity to place appropriate constraints upon the use of judicial power in equity receiverships under the securities laws. The reach of the district court's receivership jurisdiction should be limited strictly to the property of parties before the court. Wrongful conduct of those parties has subjected their property to the equity powers of receivership. Nonparties such as SVMP have neither engaged in wrongful conduct nor come within the jurisdictional reach of the federal court. Nonparties such as SVMP should not be forced involuntarily, upon the most threadbare summary notice, to pay for the "services" of the district court's Receiver, whose actions and interests are perceived as squarely adverse to SVMP's own interests. Judicial restraint requires that the line be drawn short of authorizing federal courts to seize the property of nonparties over whom the court cannot exercise jurisdiction.

II.

ASSUMING A FEDERAL COURT HAS JURISDICTION TO INCLUDE PROPERTY OF A NONPARTY WITHIN THE COURT'S EQUITY RECEIVERSHIP, ANY SUCH ACTION BY THE FEDERAL COURT MUST BE TAKEN ONLY AFTER PRIOR NOTICE TO THE NONPARTY GIVEN IN A MANNER CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

The benefits of due process were fully enjoyed by APHI and its counsel (the same counsel who became counsel to the Receiver), but the victims of their fraudulent practices were not protected at all. APHI and the persons who conducted its fraudulent practices were served with summons and complaint and given actual written notice of the appointment of the temporary receiver, and

of the hearing to be held 11 days thereafter regarding appointment of a permanent receiver. The victims of their fraudulent practices, SVMP and its limited partners, had no notice of the appointment of the temporary receiver and, so far as can be determined, had no actual notice of the hearing at which the permanent Receiver was appointed.

Nevertheless, the Court of Appeals ruled that reasonable and appropriate effort had been taken to give the property owner actual notice of the action on two grounds:

> (1) APHI and APC had actual notice of the hearing on the appointment of a permanent receiver and, since APC was then the general partner of SVMP, notice to APC was effective notice to SVMP of the hearing; and
>
> (2) On June 20, 1984, the Receiver mailed a written notice of the hearing to be held June 26, 1984, to all limited partners of SVMP.

Although these points satisfied the Court of Appeals, neither point accords fair play and substantial justice to SVMP.

In the context of the SEC's action for securities fraud against APHI and APC, no fair-minded person would expect that APC would promptly inform the victim of its fraud that a court hearing was to be held regarding appointment of a receiver.[4] Certainly APC gave no such notice to the limited partners of SVMP. But more fundamentally, the rule of law announced by the Court of Appeals which imparts notice to the victim of a fraud based upon actual notice to the perpetrator of the fraud *is not fair*. The essential purpose of the Due Process Clause is to preclude precisely that type of edict designed to clear the decks for the exercise of judicial power regardless of individual rights and interests.

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[4]Under California law, Corporations Code Section 15012, notice to a partner is *not* notice to the partnership "in the case of a fraud on the partnership committed by or with the consent of that partner." Accordingly, the SEC's notice of hearing on the proposed receivership given to APC was not effective notice to SVMP, because the notice was given in a case arising from APC's own fraud against SVMP.

On the second point, the Court of Appeals asserts that the order to show cause issued by the district court was mailed to limited partners of SVMP, but the Receiver never asserted that such notice had been given to SVMP's limited partners, and the record does not support a finding that such notice was received.[5]

Even if such a notice had been received by a limited partner of SVMP, the notice was fatally flawed in two respects: first, with limited partners dispersed across the country, a limited partner would have had about three days after receipt by mail to retain counsel and appear at the hearing in San Diego, California. Since the district court could easily prevent APHI from further unlawful activities, no urgent or compelling reason existed to require limited partners to appear on such short notice to keep SVMP's property from being subjected to a federal court receivership. Secondly, the order to show cause must have been ambiguous regarding whether the property of SVMP was to be included in the receivership estate, because the order appointing the permanent receiver is certainly ambiguous in that respect.

Despite the Court of Appeals' reliance on correspondence from the Receiver to the limited partners beginning in August, 1984, that correspondence merely gave assurances that APHI had sufficient assets to fund the receivership and that SVMP's inter-

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[5]The statement by the Court of Appeals concerning mailing of the order to show cause may be based upon discovery by the Court of Appeals of a proof of mailing filed by the Receiver in the SEC action. Neither SVMP nor its limited partners were parties in the SEC action, and no such proof of mailing was introduced as evidence in the adversary proceeding between the Receiver and SVMP. If such a proof of mailing had been introduced, a presumption would have arisen that the mailed document was received by the proven addressees, and each such addressee would have been entitled to rebut the presumption with evidence that the allegedly mailed document was never received. *See Hagner v. U.S.*, 285 U.S. 427, 52 S.Ct. 417 (1932); *In re Bicoastal Corporation*, 126 B.R. 613, 615 (Bkrtcy.M.D.Fla. 1991). Since no proof of mailing was introduced into evidence in the adversary proceeding, no presumption of receipt by SVMP or its limited partners arose, so the evidentiary record does not support the Court of Appeals' conclusion that SVMP's limited partners had notice.

ests were being separately protected. The limited partners of SVMP had no actual notice that the Receiver proposed to treat SVMP's property as included within the receivership estate until the Receiver proposed to consolidate SVMP's property with the property of all other limited partnerships through a notice dated April 25, 1985. Upon that notice, within less than two months thereafter, SVMP and its limited partners had defeated the Receiver's effort to consolidate its property into the receivership, had removed APC as its general partner, and had removed any remaining funds and authority from the hands of the Receiver.

Of course, the monies awarded to the Receiver were based upon SVMP's property being included in the receivership as of June 26, 1984. The record does not support a conclusion that SVMP and its limited partners had notice as of that date adequate to satisfy due process. The requirements of due process properly to be accorded nonparty property owners upon commencement of federal court equity receiverships presents an important question of federal law which has not been, but should be, settled by this Court.

III.

ASSUMING *ARGUENDO* BOTH JURISDICTION AND LAWFUL INCLUSION OF SVMP'S PROPERTY IN THE RECEIVERSHIP ESTATE, THE DISTRICT COURT'S FAILURE TO USE A "LODESTAR" COMPUTATION OF FEES FOR THE RECEIVER RATHER THAN AN AWARD EQUAL TO A PORTION OF TOTAL RECEIVERSHIP EXPENSES REQUIRES THIS COURT'S CORRECTION AND GUIDANCE.

Section 503(b)(3)(E) of the Bankruptcy Code, 11 U.S.C. § 503(b)(3)(E), 92 Stat. 2581, authorizes allowance of administrative expenses including "the actual, necessary expenses . . . incurred by . . . a custodian superceded under § 543 . . . , and compensation for the services of such custodian. . . ." The district court ruled that the Receiver was such a superceded custodian and that the receivership estate was entitled to an award of compensation for his services. The district court bypassed the Receiver's request for compensation based on a share of total receivership expenses in proportion to an assigned value of gross assets. Instead, the district court awarded a fee for services in exactly the same amount as the allocation formula, but determined the award to be compensation for services "at the normal rate charged in the community" (p. a24, #36) according to "a standard very similar to the standard for awarding compensation to a trustee's counsel." P. a25, #40.

However, if the district court had used the "lodestar" method of determining the Receiver's compensation, as is commonly applicable in computing reasonable attorney's fees, the award would have been computed as 49.75 hours of recorded time on SVMP matters multiplied by the $75.00 per hour paid by the receivership to the Receiver for his services, producing a total award of $3,731.25. The district court found that the Receiver actually worked an equal number of hours on SVMP matters for which no time records were kept. The expense of the services of all other persons who worked on SVMP matters were paid directly from funds and accounts of SVMP. But instead of awarding $3,731.25, or even twice that amount, the district court awarded $425,878.00 as "reasonable in light of the amount at

stake, the risks involved, and the efforts expended. . . ." P. a32, #59. The Court of Appeals affirmed this award as "reasonable," but viewed the award as "a portion of the overall receivership costs," and ruled that the district court had discretion to determine that SVMP "should bear a large percentage of these unallocated costs." P. a15.

Although the Court of Appeals ruled that the Receiver is a "superceded custodian" under the Bankruptcy Code, the Court of Appeals did not comment regarding whether the amount awarded complied with the standards applicable under § 503(b)(3)(E) of the Bankruptcy Code. Because the award was made within the context of an adversary proceeding under the Bankruptcy Code, and concurrently involves compensation to a receiver under an equity receivership operating under the federal securities laws, the award must satisfy *both* the bounds of discretion of compensation to an equity receivership and the standards applicable to compensation of a superceded custodian under the Bankruptcy Code.

If an equity receivership of a federal court is at all entitled to compensation from a nonparty for its services, that compensation should be limited to the direct expense incurred in furnishing the services. This is particularly so when the services of the receivership are thrust upon the nonparty involuntarily, as occurred with SVMP. Enlargement or enhancement of the cost of services as an "incentive," or "profit," or "reward" to the receivership is entirely inappropriate in the context of a court-ordered payment to the defendant parties' estate. The assets of the defendant parties should bear the cost of the receivership. Judicial restraint would recommend as the better rule that district courts have no power to assess nonparties for the costs of administering a receivership of defendant parties.

The district court's award to the Receiver was made without express statutory authority for such fee-shifting. By comparison, this Court's recent decision in *City of Burlington v. Dague*, ____ U.S. ____, ____ S.Ct. ____, No. 91-810 (June 24, 1992), held that "enhancement for contingency is not permitted under the fee-shifting statutes at issue." *City of Burlington* is the latest in a line of cases holding that:

> "[M]ultipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 727, 107 S.Ct. 3078, 3088 (1987).

When "enhancement" is not permitted even with express statutory authority for fee-shifting and in the presence of some "risk of loss" by the professional, then surely the bare equity powers of the district court cannot "enhance" the charge for services by increasing the $3,731.25 actually paid to the Receiver to $425,878.00 payable to the receivership by the recipient of the Receiver's services. Even permitting some leeway for the district court's view of the value of its own receivership, the use of a "multiplier" of 114 to enhance the "lodestar" cost for the Receiver's hourly services lies well beyond the pale of reason.

Section 503(b)(3)(E) of the Bankruptcy Code is not a fee-shifting statute in the ordinary sense. This statute expressly authorizes the bankruptcy court to honor a charge for administrative expenses against the bankruptcy estate, including a claim for custodial services furnished to the bankrupt. If the Receiver had no pre-existing right to be paid by SVMP for "services rendered," § 503(b)(3)(E) contains no express authority for the court to create such an obligation by SVMP to pay the Receiver. The legislative history of § 503(b)(3)(E) states that the statute was enacted to codify the law adopted in cases such as *Randolph v. Scruggs*, 190 U.S. 533, 538-39 (1903), which allowed priority payment of compensation due a pre-petition voluntary assignee, but only to the extent such fees were obligated for lawfully contracted services that were actually beneficial to the estate. By that interpretation, § 503(b)(3)(E) comes into play only when the Receiver already has an enforceable right to be paid, and then the statute authorizes the court to determine whether the claimed payment is for beneficial services and is reasonable, and to honor a proper claim. The Court of Appeals determined only that the amount awarded was reasonable and did not explicate a view that § 503(b)(3)(E) is a fee-shifting statute which authorizes the court to create an obligation for SVMP to pay the Receiver.

The issues raised by this petition arise all too often in the federal courts, but ordinarily affect the rights of citizens who are unable to pursue the costly path of judicial review. This Court's guidance is urgently needed to establish standards for protection of the rights of such citizens.

CONCLUSION

Based on the foregoing, the petition should be granted.

Dated: August 3, 1992

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: SAN VICENTE MEDICAL PARTNERS LTD.,
Debtor.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff.
v.
AMERICAN PRINCIPALS HOLDINGS, INC.,
Defendant.

SAN VICENTE MEDICAL PARTNERS, LTD.,
Debtor-in-Possession-Cross-Claimant-Appellant.
v.
ASHLEY S. ORR, Receiver of
American Principals Corporation,
a California corporation,
Receiver-Cross-Defendant-Appellee.

No. 90-55834
D.C. No. CV-84-1383-N(M)

OPINION

Appeal from the United States District Court
for the Southern District of California
Leland C. Nielsen, Senior District Judge, Presiding

Argued and Submitted
September 13, 1991—Pasadena, California

Filed May 4, 1992

Before: Robert R. Beezer, Cynthia Holcomb Hall, and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Bankruptcy/Receivers

Affirming a district court judgment awarding administrative fees to a Chapter 11 receiver, the court of appeals held that the district court properly included the property of a limited partnership in the receivership of the general partner and its parent company.

Appellant San Vicente Medical Partners, Ltd. challenged a district court order awarding administrative fees to a receiver in a Chapter 11 bankruptcy action. San Vicente was a limited partnership of American Principals Corporation, a subsidiary of American Principals Holding, Inc. The district court order appointing the receiver stated generally that he would be receiver for all funds, assets, choses in action and other property belonging to, or in the possession or control of, APHI and its subsidiaries. San Vicente subsequently filed a Chapter 11 petition. The receiver successfully obtained an order entitling it to receivership costs and expenses because San Vicente was part of the APHI receivership and thus responsible for a share of the receiver's expenses.

[1] The court dismissed the argument that the district court never included San Vicente's property in the receivership. [2] The record showed that San Vicente's property was included in the receivership for administrative purposes and that a fair and proportionate share of the expenses were to be paid from these funds and assets. [3] Because San Vicente received notice at all stages of the receivership proceedings and had every opportunity to participate in the proceedings, the fact that it was never a named party in the proceedings did not violate due process. [4] The district court has the power to include the property of a non-party limited partnership in an SEC receivership order as long as the non-party meets the minimum contacts standard of

International Shoe and receives actual notice and an opportunity for a hearing. Here, San Vicente was sufficiently involved in the receivership action to satisfy due process. [5] The fact that APC would not be entitled to management fees under the partnership agreement did not bar the district court from charging receivership expenses against receivership property. [6] Neither was the recovery of unallocated receivership expenses violative of California law. [7] The amount of the district court award was reasonable.

COUNSEL

Christopher M. Laquer, Jett & Laquer, Pasadena, California, for the appellant.

Ruben Brooks, Page, Polin, Busch & Boatwright, San Diego, California, for the appellee.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

San Vicente Medical Partners, Ltd. (San Vicente) appeals a district court order awarding administrative fees to Ashley Orr. San Vicente is a limited partnership, and Orr is the receiver for San Vicente's former general partner American Principals Corporation (APC), a subsidiary of American Principals Holding, Inc. (APHI). Orr was appointed by the district court to act as receiver for APHI, its subsidiaries, and the various limited partnerships controlled by the subsidiaries. After a bench trial, the district court concluded that San Vicente was included in the APHI receivership and that Orr was entitled to recover a portion of his expenses from San Vicente. We affirm the judgment of the district court.

BACKGROUND

In 1984, the Securities and Exchange Commission (SEC) initiated an action against APHI alleging securities law violations. APHI was the only named defendant in the SEC action. On June 26, 1984, the district court appointed Ashley Orr receiver for APHI upon application of the SEC. The district court's order stated generally that Orr would be receiver for "all funds, assets, choses in action and other property belonging to, or in the possession or control of, defendant [APHI] and its subsidiaries . . . ."

APHI was a corporation based in San Diego that syndicated investment partnerships. At the time of the SEC action, APHI and its subsidiaries acted as general partner or trustee to eighty-two limited partnerships and trusts. One of the limited partnerships was San Vicente, formed for the purpose of developing, constructing, and operating a medical office building in Los Angeles. San Vicente's general partner was APC, an APHI subsidiary. The district court's receivership order does not specifically name the APHI limited partnerships; however, it is clear that the district court intended to include as part of the receivership all property that was under the control of APHI. At the time of the receivership order, the APHI partnership network was in complete disarrray, and there was an urgent need to provide management for the partnerships controlled by APHI.

As receiver, Orr took control of the limited partnerships under the APHI umbrella, and he actively managed and completed the construction of San Vicente's office building. On June 14, 1985, the district court "spun-off" certain limited partnerships, including San Vicente, from the receivership estate. San Vicente Real Estate Corp., consisting of certain San Vicente limited partners, became San Vicente's general partner.

On February 14, 1986, San Vicente filed a Chapter 11 bankruptcy petition in the Southern District of California. Within San Vicente's bankruptcy, Orr filed a claim for administrative expenses incurred as receiver for San Vicente. Subsequently, Orr and San Vicente stipulated that Orr's claim for administrative expenses would be heard and decided by Judge Nielsen, the

district court judge who had created the APHI receivership. The matter was first referred to a magistrate, who concluded that Orr was entitled to receivership expenses from San Vicente. San Vicente appealed, and this court reversed, finding that the magistrate lacked jurisdiction because the parties had not consented to a trial before a magistrate. *In re San Vicente Medical Partners*, 865 F.2d 1128, 1130-31 (9th Cir. 1989). The case was then transferred to the district court for a new hearing. *Id.* at 1131.

On June 29, 1989, the district court held a bench trial on Orr's application for receivership costs and expenses. The court first concluded that San Vicente was part of the APHI receivership and was responsible for a share of Orr's expenses. The court noted that most of the limited partnerships had paid shares of the receivership expenses and that allowing San Vicente to avoid unallocated receivership expenses would result in a "disproportionate" and "totally unfair" burden on the other partnerships.

The district court then concluded that Orr was San Vicente's superseded custodian under the Bankruptcy Code and was therefore entitled to compensation for reasonable expenses. Based on an analysis of Orr's work with San Vicente, the court determined that Orr was entitled to expenses of $307,477.09.[1] San Vicente appeals this decision.

DISCUSSION

San Vicente argues that it is not legally responsible for any portion of the receivership expenses because it was never part of the APHI receivership. In reviewing this argument, we must consider two issues. First, we must determine whether the district court's original receivership order incorporates the funds and assets of San Vicente. Second, because San Vicente was not a party to the SEC action, we must determine whether the district

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[1]The amount actually stated in the order, $305,477.09, was calculated incorrectly. The actual amount should be $307,477.09, representing $425,878 in receivership expenses chargeable to San Vicente minus $118,400.91 for San Vicente's counterclaims against Orr for improper expenses.

court had the power to include San Vicente's property in the APHI receivership. In the alternative, San Vicente raises a third issue. Even if San Vicente is responsible for receivership expenses, San Vicente asserts that the district court erred because the receivership expenses are unreasonable. We address these three arguments in turn.

I. The Receivership Order

[1] San Vicente's first argument—that the district court never included its property in the receivership—is easily dismissed. In the proceedings below, the district court found that it had included San Vicente's property in the receivership. Whether the district court included San Vicente's property in the receivership estate is a question of fact, and we review the district court's findings on this issue for clear error. Fed. R. Civ. P. 52(a); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989) (findings of fact are reviewed under the clearly erroneous standard), *cert. denied*, 110 S. Ct. 3217 (1990).

The district court's June 26, 1984 receivership order provided that Orr would act as receiver for "all funds, assets, choses in action and other property belonging to, or in the possession or control of, defendant [APHI] and its subsidiaries . . . ." The order did not name the APHI controlled limited partnerships generally or San Vicente specifically. However, the receivership did include all assets and property controlled by APHI and its subsidiaries. APC, an APHI subsidiary, controlled San Vicente as its general partner. Therefore, the receivership order incorporates the funds and assets of San Vicente in the APHI receivership estate.

Moreoever, it is clear that the district court intended to bring the property of the limited partnerships into the APHI receivership. The individual partnerships managed by APHI and its subsidiaries were burdened with massive administrative, legal, and accounting problems which needed immediate attention. The district court determined that a receiver was necessary to manage not only APHI and its subsidiaries but also the individual partnerships that had been left in a state of complete disorder. The court also authorized the receiver to make payments from the funds and

assets of the limited partnerships and to incur such expenses "as may be necessary and advisable."

[2] As the district court explained in its findings of fact and conclusions of law, the record in this case unequivocally demonstrates that San Vicente's property was included in the receivership for administrative purposes and that a fair and proportionate share of the administrative expenses were to be paid from these funds and assets. The district court's findings on this issue are not clearly erroneous; rather, they are well supported by the record. We agree with the district court that San Vicente's property was included in the receivership estate.[2]

II. The District Court's Authority

Generally, federal courts enjoy wide discretion in fashioning relief and protective measures in SEC actions:

> The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws. This circuit has repeatedly approved imposition of a receivership in appropriate circumstances. The power of a district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a

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[2]The district court also found that Orr was San Vicente's superseded custodian under the Bankruptcy Code. A custodian is entitled to a first priority bankruptcy preference for reasonable expenses incurred in working with the debtor. 11 U.S.C. §§ 503(b)(3)(E), 507(a)(1) (1988). Therefore, as custodian for San Vicente's property, Orr is entitled to a priority claim in San Vicente's Chapter 11 bankruptcy.

The Bankruptcy Code defines custodian to include a "receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title." 11 U.S.C.S. § 101(11)(A) (Law. Co-op. Supp. 1991). Section 101(11)(A) is unambiguous; if Orr's appointment as receiver for San Vicente's property was valid, he is a superseded custodian under the Bankruptcy Code. Thus, the real issue is whether Orr's appointment as receiver for San Vicente's property was legal and valid.

> statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief.

SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (citations omitted). Thus, a federal court generally has the equitable authority to impose a receivership in an SEC action if the court determines a receivership is necessary.

San Vicente, however, argues that the district court lacked the authority to include San Vicente's property in the receivership. This argument is not without merit. Neither San Vicente nor APC was named as a defendant in the SEC action against APHI, and the proceedings against San Vicente's property in this case raise serious questions concerning the limits of the court's power. First, we must determine whether the district court's assertion of quasi in rem jurisdiction denied San Vicente due process of law. Second, we must decide whether federal law allows receivership expenses to be taken from limited partnership assets when the receiver essentially replaces and acts as the general partner. Both of these limits on the district court's power to structure a receivership are issues of law, and review is therefore de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S 824 (1984).

A. Due Process

The only defendant before the district court in the SEC action was APHI. By including the property of San Vicente in its receivership order, the court exercised control over the property of a legal entity not before the court. Therefore, we must determine whether a district court has the power to include the property of a non-party limited partnership in a receivership order.

"The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). Here, there are sufficient contacts with the forum to support assertion of quasi in rem jurisdiction over San Vicente's property without offending due process requirements. It is undis-

puted that the district court had jurisdiction over APHI, and APHI controlled San Vicente and all of its property through APC. In addition, San Vicente was formed as a California limited partnership, and its principal place of business was located in California. Therefore, assertion of jurisdiction over San Vicente's property does not violate due process under the minimum contacts analysis.

Moreover, exercising jurisdiction over San Vicente's property is consistent with "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113 (1987) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). The burden on San Vicente of litigating in California is not severe; in fact, no other forum would be more convenient for San Vicente. Thus, the district court's assertion of jurisdiction over San Vicente's property did not deny San Vicente due process under the *International Shoe* jurisdictional analysis.

San Vicente's complaints about the court's jurisdiction are directed at the failure to name San Vicente as a party to the SEC action and accompanying receivership. According to San Vicente, procedural due process requires that the owners of property must be named as party defendants to any action exercising quasi in rem jurisdiction over the property.

It is well settled "that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action." *Shaffer v. Heitner,* 433 U.S. at 206. The Constitution requires that property owners receive procedural due process in the form of notice and opportunity for a hearing. *Goss v. Lopez,* 419 U.S. 565, 577-79 (1975); *Arnett v. Kennedy,* 416 U.S. 134, 167 (1974); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Whether the opportunity for a hearing must be afforded before any preliminary deprivation of a property interest depends on a balancing of interests. *Arnett,* 416 U.S at 167-71. However, we need not dwell on the timing of the hearing in this case because opportunities for a hearing were available before any material deprivation of a property interest occurred.

Although San Vicente was not named as a party in the SEC action, it did receive actual notice of the receivership proceedings. APC, as a subsidiary of APHI, had notice of the receivership and an opportunity for a hearing. The district court specifically ordered the subsidiaries of APHI and the creditors of APHI "to show cause, if there be any, why a permanent receiver should not be appointed." Therefore, APC received notice and opportunity for a hearing before it was removed as general partner of San Vicente. Because the general partner represents and receives notice for a limited partnership,[3] the property of San Vicente was not placed in the receivership without notice and a hearing.

Moreover, even the limited partners of San Vicente received notice and opportunity for a hearing. On June 20, 1984, Orr mailed the same district court order (ORDER TO SHOW CAUSE WHY A PERMANENT RECEIVER SHOULD NOT BE APPOINTED) to all the limited partners of San Vicente. Thus, the June 26, 1984 order appointing Orr as permanent receiver over San Vicente's property did not violate procedural due process requirements.

Orr also gave the limited partners periodic updates of the receivership's progress in a chain of correspondence beginning with an August 13, 1984 letter. Throughout the receivership, San Vicente had the opportunity to object to Orr's handling of the receivership, as evidenced by San Vicente's May 20, 1985 opposition to Orr's motion for consolidation. Finally, San Vicente received a hearing on the issue of Orr's request for receivership expenses from San Vicente.

[3] Because San Vicente received notice at all stages of the receivership proceedings and had every opportunity to participate in the proceedings, the fact that San Vicente was never a named party in the proceedings did not violate due process. Although we

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[3]*See* Cal. Corp. Code § 15012 (West. 1991) (adopting Unif. Partnership Act § 12); *Stork Restaurant v. Sahati*, 166 F.2d 348, 362 (9th Cir. 1948) ("Notice to one partner is notice to all."); *Great W. Trading Co. v. Mercantile Trust Co. Nat'l Ass'n*, 661 S.W.2d 40, 43-44 (Mo. Ct. App. 1983).

agree with San Vicente that the normal procedure is to name the owners of property as party defendants before seeking quasi in rem jurisdiction over the property, the failure to name San Vicente as a party in this case did not violate due process. San Vicente received the same notice and opportunity to be heard as it would have received as a named party to the SEC action.[4]

[4] In sum, a district court has the power to include the property of a non-party limited partnership in an SEC receivership order as long as the non-party meets the minimum contacts standard set out in *International Shoe* and receives actual notice and an opportunity for a hearing. In the present case, San Vicente was "sufficiently involved in the receivership action" to satisfy due process. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984) (non-party received due process in receivership proceeding because the non-party was involved in the receivership action) (citing *American Brake Shoe & Foundry Co. v. New York Ry.*, 10 F.2d 920, 921 (2d Cir. 1926)).

B. 28 U.S.C. § 959(b)

San Vicente argues that receivership expenses cannot be paid from limited partnership assets when the receiver is acting in the place of the general partner. Under federal law, the "receiver . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in

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[4]San Vicente argues that it was denied due process because it did not receive notice that it would be liable for a portion of the receivership expenses until after the receivership had been in place for almost a year. This argument fails because it is well settled that outstanding receivership expenses may be charged against receivership property, *see O'Leary v. Moyer's Landfill, Inc.*, 677 F. Supp. 807, 822 (E.D. Pa. 1988) (citing 1 R.E. Clark, *A Treatise on the Law and Practice of Receivers* § 270, at 416 (3d ed. 1959)), and that the district court has broad equitable powers in imposing and structuring receiverships in SEC actions. *Wencke*, 622 F.2d at 1369. San Vicente cannot receive the benefits of the receivership and then argue that it is not liable for receivership expenses because it did not know receivership expenses could be charged against the receivership estate.

which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b) (1988).[5] Because Orr essentially replaced and acted as the general partner, San Vicente argues that the receiver is bound by state law as if he were the general partner. Thus, San Vicente asserts that Orr cannot recover expenses from partnership assets because APC had already been paid its management fee and had no contract right to further payment.

This analysis fails because Orr was the receiver for San Vicente's property, not the general partner of San Vicente. This distinction is crucial to our analysis. If Orr were receiver for only APC and its property, section 959(b) might require Orr to assume APC's exact role and legal relationship in the limited partnership. However, Orr was appointed receiver not only for APC and its property but for all the property controlled by APC (i.e., San Vicente's property).

[5] As receiver for San Vicente's property, Orr was required to manage the property as San Vicente "would be bound to do if in possession thereof." *Id.* However, because the receivership included San Vicente's property, section 959(b) did not require Orr to assume APC's legal relationship to the limited partners. As a receiver of the property, Orr was not an agent of APC; he was an officer of the court who managed the property under the authority of the court and incurred expenses chargeable upon the property. *Atlantic Trust Co. v. Chapman,* 208 U.S. 360, 375 (1908); *see also Bowersock Mills & Power Co. v. Joyce,* 101 F.2d 1000, 1002 (8th Cir. 1939); *Security Pac. Nat'l Bank v. Geernaert,* 199 Cal.

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[5]The purpose of section 959(b) is to prevent receivers from avoiding laws applicable to property subject to the receivership estate. *See In re Chicago Rapid Transit Co.,* 129 F.2d 1, 6 (7th Cir.) (section 959(b), formerly 28 U.S.C. § 124 (1940), requires only that the receiver or trustee operate the property in accordance with state laws), *cert. denied,* 317 U.S. 683 (1942). For example, section 959(b) requires that receivers exercise control over receivership property to avoid violation of state environmental laws. *In re Laurinburg Oil Co.,* 49 B.R. 652, 654 (Bankr. M.D.N.C. 1984).

App. 3d 1425, 1431-32, 245 Cal. Rptr. 712, 716 (1988). Thus, the fact that APC would not be entitled to management fees under the partnership agreement does not bar the district court from charging receivership expenses against receivership property.

[6] Orr's recovery of unallocated receivership expenses from San Vicente does not violate any California law. San Vicente alleges that Orr violated California law by contravening the partnership certificate and spending partnership funds on matters unrelated to San Vicente. *See* Cal. Corp. Code § 15509(1)(a), (d). These allegations are not supported by the record. We agree with the district court that the receivership produced substantial and important benefits for San Vicente. Thus, charging San Vicente for a portion of the unallocated receivership expenses is not spending partnership funds on matters unrelated to San Vicente. More importantly, San Vicente's allegations are based on its view of Orr as a general partner bound by the same constraints as APC. As discussed above, Orr was the receiver for San Vicente's property, not the general partner of San Vicente.

Therefore, we hold that section 959(b) does not burden the receiver for limited partnership property with all of the constraints imposed on a general partner and does not prevent the receiver from recovering receivership expenses from partnership property. At bottom, San Vicente's argument is premised on its view that the receivership did not include San Vicente's property. Because we reject this characterization of the receivership, we must also reject San Vicente's section 959(b) argument.

III. Reasonableness of Expenses

San Vicente asserts that the district court's award to Orr is unreasonable. The award of receivership fees in an SEC action is analogous to the award of receivership fees in bankruptcy proceedings, and we review the district court's award for an abuse of discretion. *See Southwestern Media, Inc. v. Rau*, 708 F.2d 419, 422 (9th Cir. 1983) ("A trial court has discretion to determine reasonable compensation for services rendered in bankruptcy proceedings."); *United States v. United Foam Corp.*, 618 F.2d 577, 580 (9th Cir. 1980) (trustees' fees and receivership fees

"should only be overturned on a finding of an abuse of discre tion"); *In re Abilene Flour Mills Co.*, 439 F.2d 937, 939 (10th Cir. 1971) (the principle that attorneys' fees in bankruptcy proceedings are reviewed for an abuse of discretion is also applicable to the determination of receivers' fees). The district court's findings of fact are reviewed for clear error. *See Southwestern Media*, 708 F.2d at 422.

The district court determined that Orr was entitled to $425,878 from San Vicente for unallocated receivership expenses and accounting expenses.[6] This amount is not simply San Vicente's pro rata share of Orr's total expenses; it is based on the time and effort Orr expended in managing San Vicente. San Vicente's share of the receivership expenses was greater than that attributed to the other limited partnerships because Orr spent a disproportionate amount of his time as receiver managing San Vicente affairs. Orr took control of San Vicente's construction project, which was only 41% completed when he was appointed receiver, and brought about the building's completion. The building was sold subsequently for $18,250,000, allowing San Vicente's limited partners to recoup a large percentage of their original investment.

In determining that Orr was due $425,878, the district court applied the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (determining reasonable attorneys' fees in civil rights action). *See also In re Yermakov*, 718 F.2d 1465, 1471 (9th Cir. 1983) (citing *Johnson* in using similar factors to assess attorneys' fees in bankruptcy proceeding). In sum, the court determined that Orr and his staff spent a large percentage of their time and effort working with San Vicente and that San Vicente greatly benefited from this work. In addition, the court found that the work was extremely difficult. The district court also noted that the limited partners had agreed to pay APC and a developer $3,426,500 for completion of the building while Orr and his staff performed 59% of this work for only $425,878.

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[6]San Vicente's counter-claims totalling $118,400.91 for improper expenditures were subtracted from the $425,878 to arrive at the net award of $307,477.09.

[7] The district court's factual findings, which must be accepted absent clear error, are sufficient to establish that the award was reasonable. The award represents a portion of the overall receivership costs, and the district court, within its discretion, determined that San Vicente should bear a large percentage of these unallocated costs. We find no error in the district court's findings, and we affirm the district court's award as reasonable.

CONCLUSION

The district court included the property of San Vicente in the APHI receivership, and this exercise of equitable authority did not violate due process requirements or section 959(b). The award of receivership expenses was reasonable. Therefore, we AFFIRM the judgment of the district court and hold that Orr has a first priority administrative claim as a superseded custodian in San Vicente's Chpater 11 bankruptcy.

AFFIRMED.

FILED DEC. 20, 1989
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re: SAN VICENTE MEDICAL PARTNERS, LTD.,
Debtor.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff,
v.
AMERICAN PRINCIPALS HOLDINGS, INC.,
Defendant.

Case No. CV-84-1383 N(M)
Related Cases: Bk No. 00891-Hil
Chapter 11
Adversary No. C87-0477

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter involves one of many disputes in the complicated American Principals Holdings, Inc. receivership proceeding instituted by the Securities and Exchange Commission in June, 1984. The instant dispute involves the adjudication of two sets of claims. First, the claim of Ashley S. Orr ("Orr"), Receiver of American Principals Holdings, Inc., its subsidiaries and the limited partnerships and other entities they controlled, against San Vicente Medical Partners, Ltd. ("SVMP"), one of the limited partnership entities originally included in the receivership estate for administrative purposes (see Order dated June 26, 1984), but which was "spun-out" of the receivership pursuant to this Court's Order. Orr's claim is in the amount of $512,122.00. Second, the counterclaims of SVMP back against Orr in his capacity as Receiver. These counter-claims total $335,258.88.

PROCEDURAL POSTURE

This matter was previously heard and decided by United States Magistrate Harry R. McCue pursuant to this Court's Order dated April 23, 1987. Magistrate McCue heard and decided the matter in a summary fashion. He received evidence in the form of documents and declarations, the matter was briefed by the parties, and oral arguments were heard. On November 4, 1987 the Magistrate entered his Findings of Fact and Conclusions of Law in which he awarded to Orr $425,878. Magistrate McCue offset against that award certain counterclaims made by San Vicente, resulting in a net award to Orr of $304,878.

San Vicente appealed directly to the Court of Appeals from the Magistrate's decision. On appeal the Ninth Circuit Court of Appeals determined that it was not sufficiently certain that San Vicente had agreed to have the matter heard and adjudicated by a United States Magistrate, as required by 28 U.S.C. Section 636(c). Accordingly, the Court of Appeals held that in the circumstances of this case that the Magistrate was not empowered to enter final judgment, and hence the Court of Appeals lacked jurisdiction over the appeal. Rather than dismissing the appeal, the Court of Appeals, by Order filed January 17, 1989, transferred the matter back to this Court for further proceedings.

Upon transfer back to this Court, the Court determined that the appropriate manner for the matter to proceed was by trial *de novo* before this Court.

The trial of this matter commenced on June 27, 1989, and was tried to the Court without a jury. Witnesses were called by both parties, and numerous exhibits were admitted into evidence and have been considered by the Court.

FINDINGS AND CONCLUSIONS

Based upon the evidence submitted during the course of these proceedings, the history of the complicated SEC receivership proceedings with which this Court has been intimately involved since June, 1984, the evidence adduced at the trial of this matter

and the pleadings and other matters of record herein, the Court makes the following findings and conclusions.

1. A point that needs to be addressed preliminarily is SVMP's erroneous contention that it was not a part of the Receivership Estate. Accordingly, SVMP argues, Orr is not entitled to reimbursement of any expenses, or the award of any fees for his efforts on behalf of SVMP.

2. This Court made it clear that SVMP was part of the Receivership Estate in its June, 1985 Order spinning SVMP out of the receivership proceeding. That Order, in the clerk's docket at CR:676, states:

> "The Court notes that the Order of June 26, 1984 appointing the Receiver directed him to assume management of APHI and its subsidiaries as well as to take control of all property and assets in the possession or control of APHI and its subsidiaries. The principal properties and assets under the control of APHI and its subsidiaries were and are the limited partnerships which they created, sold to investors and managed as general partner. Since APHI or its subsidiaries acted as the general partner of the limited partnerships and therefore controlled the partnerships and the assets of such limited partnerships, the Order appointing the Receiver brought the partnerships and their assets into the Receivership Estate for estate administrative purposes.

3. The threshold question is whether this Court intended that the limited partnership entities that were included in the Receivership Estate for administrative purposes should bear their fair and proportionate share of the costs and expenses of the Estate.

4. A review of the five year history of these proceedings answers this question with an unequivocal "yes."

5. It is without question that this Court intended that the limited partnerships (the actual "property" that Orr was appointed to muster and protect) were to pay their fair share of the cost of administering the Estate. To conclude otherwise would require this Court to unwind five years of its supervision of this

Estate and undo the benefits that the Receiver and this Court have created for APHI's investors.

6. On June 26, 1984 Ashley S. Orr (hereinafter "Orr") was appointed by this Court as permanent Receiver of "all funds, assets, chooses in action *and other property* belonging to, *or in the possession or control of, defendant American Principals Holdings, Inc. ("APHI") and its subsidiaries,* excepting Private Ledger Financial Services, Inc. . . ." Order Appointing Permanent Receiver, Orr's Exhibit 1.

7. Pursuant to the Order of Appointment, Orr was appointed Receiver for all "property" in the possession or control of Defendant APHI and its subsidiaries, excluding Private Ledger Financial Services. The principal "property" in the possession or control of APHI and its subsidiaries was the 82 limited partnerships and trusts that APHI and its subsidiaries had created, syndicated to investors and controlled. San Vicente Medical Partners, Ltd. was one of those 82 limited partnerships.

8. The Receivership Estate that was created by the Order of this Court has been funded, since that date, from several sources. These include the proceeds of the sale of APHI assets, the use of income earned by APHI corporate entities, and by the assessment of the individual partnership entities that the Receiver was appointed to manage and protect. This Court has previously entered numerous orders that ordered individual limited partnerships to pay their pro-rata share of administrative expenses, both directly allocatable as well as unallocatable.

9. Most of the limited partnership entities that comprise the Estate have already paid the full amount of their pro-rata share of the expenses of the Estate. A number of the partnerships have paid some, but not all, of the amounts due the Estate. Some of the partnerships have paid more than their fair share, and are entitled to reimbursement. SVMP has paid nothing to the Estate for the efforts expended by the Estate in constructing a medical office tower ultimately sold for some $18 million; a sale that netted $3.69 million for SVMP's investors.

10. If the assessment that Orr requests as Receiver of the Estate is not approved, the investors in the partnership that have

paid their way will bear a disproportionate, and totally unfair, share of the Estate's administrative expenses.

11. Forty-six (46) of the APHI limited partnerships have already, pursuant to this Court's Orders, paid their pro-rata share of Estate administrative expenses in full. These partnerships, and the amounts paid by each, are set forth in Orr's Exhibit 2.

12. In addition to these partnerships that have paid their pro-rata share in full, there are five partnerships that have actually paid (pursuant to Court Order) more than their pro-rata share. These amounts were advanced to the Estate by the partnerships pursuant to an Order of the Court dated July 26, 1985, Orr's Exhibit 3.

13. Additionally, this Court has ordered fourteen other partnerships to pay their proportionate share of Estate expenses. These partnerships, and the dates of the Court's Orders are:

	Date of Order
Cortner Square Partners, Ltd.	July 5, 1988
Dallas American Partners, Ltd.	Feb. 23, 1987
Desert Sky Partners, Ltd.	July 5, 1988
Kimball House Partners, Ltd.	July 5, 1988
Sacramento IV, Ltd.	July 5, 1988
Sacramento VI, Ltd.	July 5, 1988
Sacramento VII, Ltd.	July 5, 1988
Salt Lake Partners, Ltd.	July 5, 1988
Ocean Search, Ltd.	June 2, 1986
Ocean Search II, Ltd.	June 2, 1986
SVS Partners, Ltd.	June 2, 1986
Subscan Research, Ltd.	July 5, 1988
Windpower Research 81-I	July 5, 1988
Windpower Research 81-II	July 5, 1988

These orders are Orr's Exhibits 4, 5 and 6.

14. To the extent that it would be unfair to require those partnerships who have paid the full amount of their share of administrative expenses to bear a disproportionate burden, it would be even more unjust to allow some investors to bear less

than their share of the administrative expenses of the Estate, while other investors have paid a sum greater than their share.

15. From the above history it is without question that this Court intended that the limited partnerships (the actual "property" that Orr was appointed to muster and protect) were to pay their fair share of the cost of administering the Estate. To conclude otherwise would require this Court to ignore its numerous prior orders, unwind five years of its supervision of this Estate and undo the benefits that the Receiver and this Court have created for APHI's investors.

16. Because the history of these proceedings make it clear that this Court has throughout intended that the limited partnerships bear their fair share of the Estate's expenses, the issue for this Court to decide is not whether SVMP should pay, but how much.

17. The reasonable amount due from SVMP has already been the subject of detailed evidentiary proceedings before Magistrate Harry McCue.

18. Magistrate McCue held a series of hearings before signing his August 7, 1989 Order Awarding Administrative Fees & Costs and his November 4, 1987 Findings of Fact and Conclusions of Law. Copies of the Order and the Findings and Conclusions are Orr's Exhibits 8 and 9, and were admitted into evidence without objection.

19. Although the Magistrate McCue has already issued detailed Findings and Conclusions, this Court has considered the issues raised by Orr's claim and SVMP's counterclaims *de novo*.

20. At the trial of this matter Orr asserted a claim for $512,122.00. The amount of his claim is greater than that reflected in the Proof of Claim that Orr filed in SVMP's bankruptcy proceeding. The amount stated in the Proof of Claim was $425,878.00. The Court finds that Orr's attempt to claim a sum greater than that stated in the Proof of Claim is untimely, and, accordingly, Orr's claim is limited to the $425,878.00 figure stated in the Proof of Claim.

21. The award requested by Orr is requested on behalf of the Receivership Estate, and not by Orr personally. The sum awarded

will not go to Orr personally to compensate him for his efforts on behalf of SVMP, but instead, will be used to meet the past and continuing obligations of the Receiver in his administration of the overall Estate.

22. Absent an award of fees and costs from SVMP, SVMP will bear a disproportionately smaller amount of the costs of administration of the Estate than the other limited partnerships. This is so because SVMP will not have borne its share of the unallocable expenses of the Receivership incurred while SVMP was part of the Estate. If SVMP does not pay the Receiver for his efforts on behalf of SVMP, SVMP's share of the unallocated expenses will be borne by the other partnerships and their investors.

23. The amount sought by Orr for his efforts on behalf of SVMP will satisfy Orr's claim against SVMP for its share of the unallocable expenses of the Receivership incurred while SVMP was under the Receiver's control.

24. During the time that SVMP was part of the Estate, Orr devoted more of his time and much more of his resources, to SVMP than to any other partnership or problem.

25. Orr's claim is a first priority administrative claim in SVMP's bankruptcy proceeding, and SVMP received from the sale of the building constructed by Orr in excess of $3,000,000.00 in cash to meet this obligation.

26. Although SVMP and its investors, without question, were the victims of wrongdoing at APHI and have suffered monetary damages, that is also true of all of the other partnerships. The fact that SVMP suffered harm at the hands of APHI has little if any bearing on the entitlement of Orr, or the obligation of SVMP to compensate Orr, for his efforts on behalf of SVMP after the Receivership commenced.

27. SVMP's investors have put a value on what they believed was fair compensation for the development of the SVMP medical office building. SVMP was a syndicated limited partnership created for the purposes of developing, constructing and owning a major medical office tower on San Vicente Boulevard near Cedars

Sinai Hospital in Los Angeles. SVMP's investors expressly agreed to pay fees totalling $2,426,500.00 for the construction of the project. See SVMP Offering Memorandum, "Use of Proceeds" p. 6, "Development Contract" p. 27, "Compensation" p. 33, Exhibit 10. Orr, who took over the project when it was 41% completed, in the midst of the scandal that led to the resignations of senior management, the institution of these proceedings by the Securities and Exchange Commission, and his appointment as Receiver, seeks compensation for the Estate for his efforts that resulted in the successful completion of construction.

28. Now that the MDL 653 proceedings pending in this District before Judge Thompson have been settled, it is apparent that SVMP's investors will recover approximately 80 to 85% of their total investment from the Estate and the MDL proceedings. To not require SVMP to pay its pro-rata share of Estate expenses would result in an unfair windfall to its investors at the expense of other less fortunate investors.

29. SVMP remained part of the receivership estate until June, 1985 when the Court "spun-off" SVMP and a number of other limited partnerships from the Estate. At the time of the "spin-off", the Court denied Orr's request for an award of administrative fees against SVMP *without prejudice.*

30. Prior to removing SVMP from the receivership estate the Court directed that the Receiver's claim for administrative fees and costs would constitute a charge against the assets of SVMP and retained jurisdiction to determine the appropriate amount of the claim and to enforce that claim against the assets of SVMP.

31. Because SVMP was in a Chapter 11 proceeding Orr's administrative claim was filed in the Bankruptcy Court pursuant to Bankruptcy Code Sections 543(c)(2) and 503(b)(3)(E). Orr's claim seeks reasonable compensation for services rendered by Orr, as Receiver, for the benefit of SVMP. The compensation sought is not sought by Orr to be paid to himself personally. Rather, it is sought to be paid to the Receivership Estate, for the services rendered by Orr and his staff.

32. To not require SVMP to pay its proportionate share of Estate costs would not only be inconsistent with this Court's prior

Orders requiring limited partnerships to pay their way, it would also be inconsistent with the Court's prior order establishing the priority of claims and establishing the claims procedure. The prior order, Orr's Exhibit 11, gave creditors a priority above limited partner investors. To allow SVMP to avoid its fair share of Estate expenses would result in SVMP's investors, in effect, being given a priority over the creditors, as well as over all other limited partner investors.

33. Bankruptcy Code Section 503(b)(4) provides for payment of reasonable compensation based on the "cost of comparable services other than in a case under this title."

34. Some cases under the Bankruptcy Act suggest the following factors as appropriate for a court to consider in determining the reasonableness of fees: the time and labor required; the novelty and difficulty of the questions presented; the skill required to perform the service properly; the preclusion of other employment due to acceptance of the case; the customary fee for similar services; whether the fee is fixed or contingent; the time limitations imposed by the circumstances of the case; the amount involved and results obtained; the experience, reputation, and ability of the claimants; the undesirability of the case; and awards in similar cases. See, e.g., *In re Texas Gulf Industries Inc.* (1979 BC Tex) 4 BCD 186, 16 CBC 129.

35. As described at length in the Receiver's five Reports filed with the District Court, Orr's Exhibits 12, 13, 14, 15 and 16, the Estate commenced with massive administrative, legal and accounting problems. Substantial time and labor was required to organize and administer the Estate, handle legal problems created by prior management as well as those related to administration of the Estate, and begin to assemble a coherent accounting system. The novelty and difficulty presented by this Estate cannot be overestimated.

36. The standard for compensating custodians is payment at the normal rate charged in the community for equivalent services. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 657-9 (9th Cir. 1985).

37. The amount requested as an award to the Receivership Estate for Orr's efforts on behalf of SVMP is also expressly

intended by Orr as an award that would satisfy his claim against SVMP for its proportionate share of the Receivership's unallocated expenses. In other words, Orr has agreed that the award he requests based on the services rendered to SVMP for the benefit of SVMP would satisfy his other, and additional, claim for reimbursement of unallocated expenses of the Receivership.

38. Bankruptcy Code Section 543(b) authorizes the Court to allow administrative expenses including "the actual, necessary expense" incurred by a superseded custodian and the counsel for a custodian. Section 543(c) further provides that the Court shall pay costs and expenses incurred by a custodian.

39. There is no question that a receiver may employ staff and that the Bankruptcy Estate may bear that expense in addition to the compensation paid to the Receiver, if the cost of employment was an actual and necessary expense.

40. 11 U.S.C. 543(c) and 503(b)(3)(E) and (4) authorize an award of reasonable compensation for services actually and necessarily rendered by the Receiver, and establish a standard very similar to the standard for awarding compensation to a trustee's counsel.

41. The language of the statutory provisions for the award of compensation to a receiver and counsel are virtually identical to the statutory provisions relating to compensation of professionals employed by a trustee in bankruptcy. The factors examined in awarding a reasonable fee include, but are not limited solely to, the benefit to the estate from the services rendered. However, the benefit of the services rendered cannot be measured solely by concrete benefits, such as the reduction of assets to cash. The Court has not been provided with any authority that holds that "benefit" must be so strictly limited.

42. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which involved a claim by attorneys for fees in a civil rights action, the court listed the following twelve factors which should be considered in awarding compensation:

1. The time and labor required;

2. The novelty and difficulty of the questions;

3. The skill requisite to perform the services properly;

4. The preclusion of other employment due to acceptance of the case;

5. The customary fee;

6. Whether the fee is fixed or contingent;

7. Time limitations imposed by the client or circumstances;

8. The amount involved and the results obtained;

9. The experience, reputation, and ability of the applicant.

10. The "undesirability" of the case;

11. The nature and length of the professional relationship with the client; and

12. Awards in similar cases.

43. In *In re Yermakov*, 718 F.2d 1465, 1471 (9th Cir. 1983), the Ninth Circuit held that the same factors should be considered in connection with awarding fees to professionals in bankruptcy proceeding.

44. The Court's findings on each of the twelve factors are:

1. *Time and Labor required.* The Court received testimony on this factor from Orr, C.A. Workman, Tom Scheuneman and Christine Springer. The Court admitted Exhibit 17, copies of Mr. Orr's time records reflecting the amount of time that he *personally* spent dealing with SVMP's problems. Orr testified that he recorded only approximately ½ of the actual time be spent on SVMP, and the Court so finds. Orr's personal time records, of course, do not include the time spent by his staff. Orr devoted far more of his time and the Estate's resources to SVMP than to any other partnership in the Estate.

2. *The novelty and difficulty of the questions.* The Court also received testimony on this factor from Orr, Workman, Scheuneman and Springer. Orr took over the SVMP project when it was half constructed, when the construction loan was

in default, when the general contractor and subcontractors were owed large sums, when APHI was under the dark cloud of an SEC action and the receivership proceedings, when prior senior management had been forced to resign, and when SVMP's investors were confused, frustrated, angry and hostile. In spite of all of these impediments, Orr successfully completed the construction of the project, placating all of the interested parties except the faction that took over control of SVMP.

3. *The skill requisite to perform the services properly.* By solving the myriad problems faced by the SVMP project, Orr unquestionably showed the necessary skill to perform the services properly.

4. *The preclusion of other employment.* Although SVMP was but one of approximately 80 partnerships administered by Orr, the time, energy and resources devoted to the SVMP project by Orr and his staff were greatly disproportionate to the time devoted to other partnerships and limited the amount of time and the resources Orr had to devote to other partnerships.

5. *The customary fee.* The best evidence of the "customary fee" is the fee that the SVMP investors initially agreed to pay in an arm's length transaction. The investors agreed to pay development and general partner fees totalling $2,426,500 for the development and construction of the project. Orr took over the project when it was only 41% completed. Orr's Exhibit 18 reflects the expenditures incurred completing the SVMP project by Orr. In excess of $9,700,000 of the total expenditures of $17,309,213 were made by Orr. Orr, however, seeks only the sum of $512,122 for his efforts that resulted in the successful completion of construction. In contrast, one half of the fees that SVMP previously agreed to pay to have the project successfully completed would amount to a "customary fee" of $1,213,250.

6. *Whether the fee is fixed or contingent.* All administrative fees, either in the bankruptcy court or the receivership

proceeding, are subject to Court approval and, accordingly, are contingent in nature, thus increasing the risk of nonrecovery. The hostility of the SVMP investor group increased the risk to Orr that the Estate would not be fairly compensated for the Receiver's efforts on behalf of SVMP.

7. *Time limitations imposed by the client or the circumstances.* It was essential that Orr move quickly and decisively to gain the confidence of the contractors and the construction loan lender if the project was to be completed. In spite of the obstacles he was successful.

8. *The amount involved and the result obtained.* At stake was the construction of a project valued by the Receiver at $20,000,000.00. If unsuccessful the entire investment made by SVMP's investors would have been lost. After Orr completed the project the SVMP investor group succeeded in taking control of the project from the Receiver. That resulted in the construction lender immediately instituting foreclosure proceedings that forced SVMP into bankruptcy. Even in this far more deteriorated condition, the SVMP project was sold for in excess of $18,000,000.00 and netted SVMP's investors $3,690,000. If Orr had not successfully completed the project and protected the investors' position until the SVMP group took over the project, the investors' funds would have been lost.

Indeed, SVMP's own evidentiary submission supports Orr's position. The Cramer decl., Orr's Exhibit 19, admits that the office building that Orr constructed was appraised at between $18 and $20 million. Cramer admitted on cross-examination that no improvements had been made to the property from the time it left the Estate to the time it was sold for a price that netted SVMP's investors $3.69 million.

9. *The experience, reputation and ability of the applicant.* Mr. Orr's qualifications have not been seriously challenged by SVMP.

10. *The "undesirability" of the case.* At the request of this Court, Orr came out of retirement to take the helm of a

rudderless ship that was sinking in a storm. This was clearly an "undesirable task."

11. *The nature and length of the professional relationship with the client.* Orr had no prior contact with the APHI entities or individuals.

12. *Awards in similar cases.* Again, perhaps the best evidence of the reasonableness of the award requested is that it is a mere fraction of the amount of fees that the SVMP investors agreed to pay for the development and construction of the project.

45. In *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985), the Court did not abandon the review of all of the above twelve factors, but emphasized that the most important factors are what fees might be awarded in non-bankruptcy matters, to minimize the incentive of professionals to abandon the area of bankruptcy practice. The same analysis applies here.

46. Benefit is one of many factors which must be considered in determining an appropriate award, and as discussed above, this Court finds that the services rendered greatly benefited SVMP and its bankruptcy estate.

47. Fees in the instant case were contingent on Court approval and the ability of the Estate to pay. The need for Court approval creates a contingency on payment of fees in both receiverships and bankruptcy proceedings, but these proceedings demonstrate that the possibility of a superseding bankruptcy makes payment of fees for services by a receiver perhaps even more contingent than fees for a trustee or professional in bankruptcy.

48. The Ninth Circuit Court of Appeals has explicitly held that the type of concrete benefits consisting of liquidation of assets or elimination of claims *are not* necessary to demonstrate that beneficial services have been rendered. See *Bass v. Quittner, Stutman & Treister*, 381 F.2d 54, 58 (9th Cir. 1967) wherein the Ninth Circuit broadly defined "benefit."

49. The *Nucorp* and *Johnson* cases make it clear that the Court should award reasonable compensation to the Receiver for all services actually, necessarily, and properly rendered in connec-

tion with the superseded receivership proceeding. The Court may consider several factors, including benefit to the estate, all of which have been demonstrated to support an award in this case.

50. SVMP contends that Orr's compensation as Receiver of SVMP is limited to the compensation specified in the SVMP Limited Partnership Agreement. That limited partnership agreement, of course, pre-dated the institution of the receivership proceedings by several years, and governed the relationship that existed between American Principals Corporation, SVMP's general partner, and SVMP's limited partner investors.

51. The illogic of SVMP's argument is easily demonstrated. If a receiver was appointed, as here, to take control of a limited partnership entity such as SVMP, and the limited partnership agreement did not provide for the payment of any compensation to its general partner beyond what had already been paid to the deposed management, the receiver would be prevented financially from performing his duties, and the purposes of the District Court's receivership appointment would be frustrated. Likewise, if, as SVMP contends, the Receiver's *only* remedy is to submit the matter to a vote of the limited partners and request an amendment to the limited partnership agreement, the District Court's appointment would also be frustrated because effective control of the receivership would rest not in the District Court, but with the limited partners.

52. It is probably safe to assume that SVMP would be advancing an entirely different argument if the limited partnership agreement had specified some very generous future compensation for the general partner, and Orr had requested compensation on that basis rather than on the basis requested.

53. Clearly, the compensation payable to a Court appointed receiver is not, and cannot be limited to pre-existing pre-receivership compensation contracts. Under 11 USC § 543(c)(2) custodians in bankruptcy cases are awarded reasonable compensation and reimbursement of expenses upon application. No reference is made to compensation being limited by anything other than the "reasonableness" standard. The same is true as to compensation to other professionals providing services to the estate. (11 USC

§ 503(b).) The standard of "reasonable" compensation without reference to any pre-existing contractual limitation is further substantiated by *In Re Texas Gulf Industries, Inc., In Re Nucorp Energy, Inc., Johnson v. Georgia Highway Express, Inc.* and *In Re Yermakov, supra.* These decisions specifically set forth detailed factors to be considered by the courts in determining a reasonable rate of compensation. Nowhere is there any suggestion that a pre-existing contract be the determinant in evaluating compensation.

54. SVMP's contention that compensation should be limited by the contract is either disingenuous or a naive approach to the circumstances presented. The reality is that APHI went into receivership. This is a dramatic change which immediately alters the status quo and, in this case, placed the receiver in a desperate position. As a result of the receiver's and his staff's persistence, the medical building was completed and the partners of SVMP did nothing more than gain from the receiver's efforts.

55. In the instant case the SVMP limited partners watched the Receiver, his staff and his professionals work diligently for an entire year to successfully complete the development and construction of their $20,000,000 medical office tower. Now they object to compensating the Receivership Estate for that effort.

56. SVMP also contends that Orr is disqualified from receiving any compensation from SVMP because of alleged conflicts of interest between SVMP and American Principals Corporation, both entities in the Receivership Estate.

57. If SVMP's argument were adopted by this Court, it would cause chaos in receivership proceedings such as the instant one, and would act to frustrate one of the fundamental purposes of the receivership process, i.e., to place control of a legally troubled business concern in the hands of a qualified officer of the Court in order to *quickly* and *efficiently* evaluate and manage the concern's problems and prospects. The on-going business concern in the APHI receivership was a complicated amalgam of 82 interrelated limited partnerships and trusts, as well as numerous corporations. The receivership was instituted by the SEC because of the discovery of widespread commingling of assets between and

among the corporations, partnerships and trusts that comprise the receivership estate. If SVMP's "conflict" argument is adopted, the result would be that in instances with widespread commingling, such as the APHI receivership, the Court would have to appoint a separate receiver for every entity because of the "conflicts". The result would be chaos.

58. SEC receiverships proceed with the ongoing scrutiny, oversight and approval of the District Court. The review of the Receiver's decisions, including the reconciling of conflicting interests, is clearly within the power of the District Court.

59. The Court finds and concludes that the administrative fee requested by Orr of $425,878.00 in the Proof of Claim filed in SVMP's bankruptcy proceeding is reasonable in light of the amount at stake, the risks involved, and the efforts expended on behalf of the SVMP partnership. The $425,878.00 claim stated in Orr's Proof of Claim is a fair and reasonable fee and is typical of the sums paid in the community for comparable work.

60. The SVMP project was properly and effectively administered and the work performed should be paid at the fee requested in the Proof of Claim.

61. The administration of the SVMP partnership produced substantial and important benefits to the partnership and the Bankruptcy Estate. Orr's request for administrative fees is granted in the sum of $425,878.00.

62. SVMP has asserted counterclaims against Orr, as receiver, for various amounts totalling $335,258.88.

63. Based upon the evidence adduced at trial, the Court finds and concludes that SVMP is entitled to recover on the following claims:

1. The so-called Abacus loan payment of $10,000.00.
2. The Kenneth Leventhal amounts of undocumented expenses of $48,455.00.
3. Non-tax expenses after April 18, 1985 of $14,945.91.
4. IRS penalties of $45,000.00.

64. The total amount the Court awards on SVMP's counterclaims is the sum of $118,400.91.

65. The rest and remainder of SVMP's counterclaims are denied.

Accordingly, judgment should be entered in Orr's behalf for the difference between the sum of $425,878.00 awarded on Orr's claim and the sum of $118,400.91 awarded to SVMP on its counterclaims. The clerk is therefore directed to enter judgment in favor of Orr in the sum of $305,477.09.

IT IS SO ORDERED.

Dated: December 18, 1989

Leland C. Nielsen

LELAND C. NIELSEN

Judge of the United States District Court

FILED FEBRUARY 5, 1990
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

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Debtor-in-Possession

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: SAN VICENTE MEDICAL PARTNERS, LTD.,
Debtor.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff,
v.
AMERICAN PRINCIPALS HOLDINGS, INC.,
Defendant.

Case No. CV 84-1383 N(M)
Related Case: Bk No. 86-00891-Hil
Reference Removed
Chapter 11 Adversary No. C87-0477

ORDER RE CREDITOR CLAIM OF ASHLEY S. ORR AND COUNTERCLAIM

Date: February 5, 1990
Time: 10:30 a.m.
Courtroom: 10

Pursuant to the findings of fact and conclusions of law entered December 21, 1989, it is hereby

ORDERED that the creditor claim of Ashley S. Orr being claim number 000000014, is allowed in the amount of $425,878.00, the counterclaims of San Vicente Medical Partners, Ltd., debtor-in-possession, against Ashley S. Orr are allowed in the amount of $118,400.91, for a net amount due Asley S. Orr by San Vicente Medical Partners, Ltd. of $305,477.09.

DATED: February 5, 1990

LELAND C. NIELSEN
United States District Court Judge

CONSTITUTION AND STATUTES INVOLVED

I. The Due Process Clause of the Fifth Amendment to the Constitution of the United States of America provides as follows:

"No person shall be . . . deprived of life, liberty, or property, without the due process of law. . . ."

U.S. Const., Amend. V.

II. Section 27 of the Securities Exchange Act of 1934, as amended, provides as follows:

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the disrict wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

June 6, 1934, c. 404, Title I, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

29 U.S.C. § 78aa.

III. Section 503(b)(3)(E) of the Bankruptcy Code provides as follows:

"(b) After notice and hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including —

. . .

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection incurred by —

. . .

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian. . . ."

11 U.S.C. § 503(b)(3)(E),
92 Stat. 2581.